CONSTITUTIONAL DIFFICULTIES OF TRUST REGULATION

By Warren Bigelow, Ph.B., LL. M.,
Of the New York Bar.

The present administration at Washington, in seeking to enact laws that will curb the power of the *trusts* and prevent the abuses so common among them, has heeded the outcry raised by many intelligent people. But the popular notion seems to be that all Congress has to do is to pass laws much as Aladdin might rub his lamp, and the wished-for remedy will appear. We must not forget that Congress is limited in the scope of its action by a written Constitution, and that the acts of the legislative department must be done with a view to carrying out some power granted to Congress. If that body passes a law that is not in harmony with the Constitution, it will be pronounced void by the Supreme Court.

I.

Nowhere in the Constitution is Congress given the power to charter, regulate or control a corporation. It has long since been decided by the Supreme Court, however, that Congress has not only the specific powers mentioned in the Constitution, but also the implied powers which are necessary or proper to exercise in the performance of its specific duties. Thus, the authority vested in Congress "to establish post offices and post roads" is a definite grant of power which carries with it authority to legislate on subjects remotely connected with the mail service—authority, for example, to build a prison if that were necessary to punish those who rob the mails.

There is another important clause in the Constitution which must not be forgotten. Article X of the amendments reads: "The powers not delegated to the United States nor prohibited by it to the

states, are reserved to the states respectively or to the people." As the Constitution does not give to the federal government the right to charter or control corporations, that right must be reserved to the states or to the people; and since corporations are in all cases created by legislation, the right must be reserved to the states. It follows that any attempt on the part of Congress to enter this field of legislation, is an infringement on state rights, and therefore unconstitutional.

This conclusion must be absolutely true unless there is some specific duty imposed on Congress, the proper fulfillment of which demands that Congress legislate concerning corporations. It would then have implied power to do so. A very apt illustration is found in the chartering of a bank of the United States, which was upheld by the Supreme Court on the ground that it was incidental to the coinage and regulation of money—a prerogative vested in Congress. Yet this may not be so apt an illustration as the post office clause; for, with respect to the chartering of a bank of the United States, the Supreme Court said that it was an attribute of sovereignty to create a corporation, and no specific right need be vested in Congress.[1] If this be true, there is no need to seek further for constitutional justification for federal incorporation of interstate companies. The proposition is clear: let the United States charter all companies that desire to carry or sell goods among the several states.

Commissioner Garfield, in his report on corporations, finds some legal difficulties in such a measure, and indeed there are some. While it may be clear that Congress can incorporate a company doing interstate business, it is not evident that it can in this way abolish the trusts already created by state legislation. With that subject we shall deal presently. The commissioner recommends "Federal License" or "Federal Franchise."

Now, if any form of regulation or control is sought other than by direct federal incorporation, where shall we find authority? Aside from that very vague article which makes Congress the custodian of the public welfare, the only constitutional clause wherein we may hope to find authority for trust legislation, is that which says: "Congress shall have power to regulate commerce with foreign nations and among the several states." Under this clause the Sherman anti-trust law was passed in 1890, "to protect trade and

[1] McCulloch *vs*. Maryland, 4 Wheaton, 316.

commerce from unlawful restraint and monopoly." It provided that "any combination in form of trust or conspiracy in restraint of trade shall be illegal, and any participant in such combination . . . guilty of a misdemeanor." Up to the present year the Sherman act was so limited by judicial interpretation that it applied only to railroads and other common carriers. In the case of the United States against Knight Company[2] it was held that a monopoly for the manufacture of sugar did not fall within the provisions of the Sherman law because that act applied to interstate commerce only, and commerce did not commence until after the sugar had been manufactured. The court freely admitted, however, that a monopoly for the manufacture of sugar might tend to raise prices, and thus indirectly interfere with interstate commerce. The breaking up of the Northern Securities merger did not operate to extend the scope of the act, because that too dealt with common carriers. The recent "Beef Trust" decision is somewhat broader, but in that case the court found a conspiracy to exist which in their opinion was in restraint of trade. It is quite obvious that there are many abuses of the trusts which cannot be called a conspiracy in restraint of trade—abuses like the watering of stock—which tend to increase public suspicion of corporate organization, and which, as Judge Grosscup has pointed out, tend to lessen and destroy individualism by making the mass of the people withhold their capital from active business enterprise, abuses which must be checked, but which cannot be reached by the laws as they stand to-day.

Legislation must be extended so as to embrace control of corporations in all their functions. Whatever form such legislation may take, it must be enacted with a view to carrying out the power now vested in Congress to regulate commerce. To what extent would federal legislation be justifiable as a means to that end? As John Marshall said in the case of Gibbons against Ogden:[3] "The power to regulate commerce is not restricted to any one mode or any one branch. The term commerce describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing the rules for carrying on that intercourse." This language is full of meaning: the power is not restricted by any one mode *of regulation* or any one branch *of com-*

[2] Reported, 156 U. S. 1.
[3] 9 Wheaton, 1.

merce, and commerce is regulated by *prescribing the rules for carrying on that intercourse.* Under this decision it would seem that a rule requiring all corporate acts be made public, or a rule prescribing that all commerce among the states be carried on only by individuals licensed, or by corporations chartered, by the United States, would be upheld as the exercise of an implied power.

Or again, if, as the court said in the sugar case, a monopoly for the manufacture of sugar may raise prices and thus *indirectly* interfere with interstate commerce, surely it may be added that Congress is not limited in the scope of its action to preventing *direct* interference. It may regulate commerce to the last and most minute detail, just as it may regulate the mail service to the last and most minute detail; it "acknowledges no limitations other than those prescribed by law;" and it may prevent indirect as well as direct interference with the trade among the several states.

Our conclusion is that the Supreme Court would, in a test case, be justified in upholding almost any form of legislation in this field, on the ground of implied powers; for the court would consider only this question: "Was the act of Congress designed as a means to the regulation of commerce, and is it adaptable to that end?" The court does not ask whether the law is necessary or unnecessary,—it asks whether it was enacted in pursuance of the carrying out of some power vested in Congress. But the Supreme Court might not uphold such legislation; it might follow the sugar case, and say that Congress has jurisdiction only over interstate commerce as such, and that any attempt to regulate, beyond the actual transportation of goods from one state to another, would be *ultra vires.*

There is naturally considerable room for conjecture as to how far the court would go. Let us take an illustration: we read much nowadays about copper mines without copper, and stock without assets—well, suppose Congress passed a law requiring all corporations doing interstate business to publish sworn statements of their assets, liabilities, earnings and stock issued. Would not the Supreme Court be entirely justified in ruling that such enactment did not affect commerce and was therefore unconstitutional? Even if such a law were sustained, can a mining company engaged in digging ore, and an oil company engaged in boring the earth, be said to be doing interstate commerce when both perhaps sell their product to another company (though owned by the same capitalists) which

transports the goods? What can prevent a coterie of railroad magnates from organizing themselves into a terminal company, selling themselves the privilege of landing passengers and freight, and thus fleecing the small stockholder and the public in general? None of these companies is engaged in interstate commerce. Herein lies the difficulty of all legislation designed to prevent fraud: it can, under the Constitution, be directed against *"interstate"* companies only, while others continue their fraud and abuses as indicated above.

Something can, no doubt, be accomplished by federal intervention. Of the methods usually spoken of to-day, "federal incorporation" seems to the author a more logical solution than mere "federal franchise," first because it does not involve the rather absurd situation of a corporation created by a sovereign state being taxed, controlled and allowed to live by the sovereign United States; and secondly, for reasons which will appear in Part II.

II

The difficulty to be overcome in trying to solve the trust problem by means of federal incorporation does not lie in the vastness of the undertaking (that is a detail of the executive function), but rather in the conflict between state and nation—in the infringement on state rights which it seems to involve.

Several vital and intimately connected questions arise: (*a*) Was the right to create a corporation reserved to the states by reason of the fact that it was not granted to the United States? (*b*) May not both the United States and the several states enjoy the right? (*c*) Would it be possible for the United States to control or destroy the corporations created by the states or to prevent their engaging in interstate business?

(*a*) As we said in Part I, the right to create a corporation was certainly reserved to the states, unless it can be said that the United States has that function irrespective of direct grant in the Constitution. As a sovereignty, this nation can create a corporation. Nothing further appearing, it would be fair to assume that both the federal and state governments may exercise the right concurrently; the United States because of its sovereignty, and the states because the power which they had before the adoption of the Constitution was never taken from them. Or if the "commerce clause"

impliedly gave the right to the United States, at least the states may exercise the right until Congress chooses to do so.[4]

(*b*) While it is feasible to have corporations chartered by different powers operating at the same time, that situation does not help matters. Now, the doctrine is well settled that where the federal government has not acted, the states may, but when Congress legislates with respect to a subject matter within its jurisdiction, the states are thereby precluded.[5] As long ago as 1824 the State of New York was prevented from creating a steamboat trust, with the exclusive privilege of navigating the waters in and about New York. Congress having theretofore provided for the licensing of coasting vessels, had thereby withdrawn the subject-matter of navigation from state control, and the franchise granted by the New York legislature was pronounced void.[6]

If then, Congress enacted laws providing that no corporation hereafter organized shall conduct an interstate business unless the same shall have been organized under federal law, the whole subject-matter would be withdrawn from state control, and the system of incorporating in one state for the purpose of exploiting the others would be at an end. But all this is not enough: it will not suffice to create good trusts in the future—we must rid ourselves of the bad trusts of the present.

(*c*) One thing is essential if federal incorporation be the plan adopted: existing as well as future companies must be brought within the federal law. To condemn the charters under the power of eminent domain would vest proprietorship in the United States—perfect state socialism. To declare the charters void would, under the decision in the case of "Dartmouth College against Woodward,"[7] be a violation of contract and therefore unconstitutional. There remains but one way in which the nation could secure control: tax the franchise or stock of state corporations doing interstate business so heavily that they would be forced to accept federal charters.

From the days of the Boston tea party the American people have had a deadly hatred for anything resembling unjust taxation. But a prohibitive tax is not unknown in this country. Under the stress of the Civil War the United States becoming obliged to secure

[4] Thurlow *vs.* Mass., 5 How. Rep. 504.
[5] Brown *vs.* Maryland, 12 Wheaton, 419.
[6] Gibbons *vs.* Ogden, 9 Wheaton, 1.
[7] 4 Wheaton, 518.

a market for its bonds, placed a prohibitive tax of 10 per cent. on the issue of bank notes by state banks, and thereby forced the great majority of them to accept national charters and buy United States bonds.

In support of this means of securing control it may be argued that the tax would probably be upheld by the Supreme Court as incidental to the proper regulation of interstate commerce; for taxation has ever been recognized as a means of regulation. Moreover, if the United States taxed state corporations, the states could not—"for the term to regulate implies full power over the thing regulated; it excludes necessarily the action of all others who would perform the same operation on the same thing." Nor could any state tax a federal corporation.[8] There seems to be a conflict of interests in this situation. But where a conflict exists between state and nation, "that authority which is supreme must control, not yield to, that over which it is supreme."

One objection raised by Commissioner Garfield in his report was that "federal incorporation" would centralize vast power in the United States. On the contrary, this fact ought not to be considered an objection. The commissioner himself finds that the great difficulty attending regulation to-day lies in the diversity of state laws. Concentration of power would bring uniformity in the law as well as centralization of responsibility: to these we had best look for the desired reforms.

It is difficult to see how even compulsory federal incorporation could reach that class of evils mentioned at the end of Part I of this article, unless the nation arrogate the function of creating all corporations. But to take from the states by constitutional amendment, the right to create a corporation designed to operate within the state would be to spoil that nice adjustment of sovereignty between state and nation which forms so distinguishing and so highly cherished a feature of the American government. Many careful thinkers, however, recommend a constitutional amendment as the most practical solution; others, less careful, say, "between friends, what is the Constitution, anyhow?" and point to extra-constitutional acts in the past.

[8] On taxation in general, see McCulloch *vs.* Maryland, 4 Wheaton, 316; Brown *vs.* Maryland, supra; Telegraph Co. *vs.* Texas, 150 U. S. 460; and Fargo *vs.* Mich., 121 U. S. 230.

III.

It is true that many things have been done at Washington without the sanction of law; but there is a factor in the affairs of nations as well as of men, that transcends all law: economic necessity is a compelling force not to be restrained by written constitutions. When Jefferson negotiated the purchase of Louisiana he acted contrary to his own tenets and without authority. A great cry was made a year ago that President Roosevelt had overridden the Constitution in recognizing the Republic of Panama. Perhaps he did; at least it is clear to the writer's mind that the Republic would not have been recognized, had not the President foreseen the strategic and commercial necessity of building the canal. In 1803 it became essential for this nation to control forever the Mississippi and the commerce of North America; a century later it became essential for this nation to control the gateway to the Pacific, and thus assure forever dominion over the western continent and the trade of the world. These things and others have been done at the call of economic necessity, and have been ratified by Congress and approved by the people because they were necessary and not because they were within the strict letter of the law.

We must not, however, look for relief in the *trust* situation except through laws properly passed; for in the first place, *trust* legislation is far more likely to be brought before the Supreme Court for adjudication than matters of foreign policy; and in the second, the economic necessity for extra-constitutional action is not manifest when there is ample time to amend the Constitution if necessary. By an amendment, the powers of Congress might be carefully defined and the scope of its authority so extended as to give it exclusive jurisdiction to create and control all interstate companies. Some decided benefits might follow such a course. If the powers of Congress were exactly defined, the laws enacted would not run so great a risk of being pronounced unconstitutional. Again, the United States Senators might be more ready to act under the authority of an amendment than they showed themselves to be last year. At any rate the "common people" who are interested in railroad and *trust* matters (though not in the same way as many of the senators) would be in a position

to demand that some action be taken by the senators and representatives, or that their chairs in Congress be vacated.

Not the least objectionable feature of this plan, however, is the difficulty of the procedure. Two-thirds of both houses of Congress must agree on the amendment, which must then be ratified by three-fourths of the state legislatures.[9] If the Senate parly a whole winter over giving the Interstate Commerce Commission increased jurisdiction, we might expect them to agree on an amendment in the time of our great-grandchildren. More than that, the "State Rights" doctrine is still so strong in many states that it is very much to be doubted if three-fourths of the states could be brought to see the virtue in an amendment which would vest in the national government any increased power. Another great objection to passing an amendment is the fact that the necessity therefor is not absolutely apparent, and we ought not to tamper with our fundamental law unless the need is urgent. Until Congress has exhausted its present resources (the implied powers) there is no occasion for employing other ways and means for securing regulation of the *trusts*. Yet, as we have said, the only way to exhaust the present resources is to pass laws designed as a means to the regulation of "commerce among the several states," and then if these laws are pronounced unconstitutional, to enact new laws—surely a tedious and somewhat dangerous method involving many possible upheavals in the financial world as well as general business depression. It is not an easy thing to pass *trust* laws which will be upheld, for, as we have pointed out, the authority for such enactments can be found only by a breadth and liberality of judicial interpretation such as John Marshall was wont to give to the Constitution.

Without desiring to be pessimistic, we must say that even if appropriate laws were passed and sustained, no great good could be accomplished unless the enforcement thereof were vigorous and effective. The wiser policy will be to make haste slowly, and use the utmost care and skill in passing *trust* legislation, for the solution of the problem is as difficult and as complicated as the question itself is serious, and it demands both time, and the best work of the best brains of the land.

[9] Const. Art. 5.